Supreme Court, U.S.
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No. 82-856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA ex rel. GERALD SCARPELLI,

Petitioner,

v.

ROBERT A. FISCELLA ~~RICHARD GEORGE,~~

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the petitioner has presented a question worthy of review by this Court where there is no conflict among the circuits, no conflict between this Court and the Seventh Circuit, and the claim has already been rejected as not worthy of review in a previous application for certiorari by this petitioner.

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PRAYER

The respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit insofar as the petitioner's issue does not raise a question of constitutional proportion worthy of review by this Court.

JURISDICTION

For the reasons set forth in the argument following, the petitioner has failed to demonstrate any reason for this Court to exercise its judicial discretion and grant the petition for writ of certiorari.

STATEMENT OF THE CASE

The petitioner's statement of the case adequately sets forth the procedural history of this case. The respondent relies on the facts as contained in the Seventh Circuit's opinion filed with this Court as Appendix A to the petitioner's petition.

REASON FOR DENYING THE WRIT OF CERTIORARI

THERE IS NO QUESTION WORTHY OF REVIEW PRESENTED WHERE:

A. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS.

The petitioner suggests that an inter-circuit conflict exists because the rule of the Seventh Circuit is that the harmless error doctrine applies to confrontation clause violations whereas the rule of the Ninth Circuit is that the harmless error doctrine does not apply.

But there is no such conflict among the Circuit Courts. The general rule throughout is that the harmless error doctrine applies where there has been a restriction of cross-examination. *United States v. Keane*, 522 F.2d 534, 559 (7th Cir. 1975); *United States v. Pugh*, 436 F.2d 222 (D.C. Cir. 1971); *United States v. Kearney*, 420 F.2d 1970 (D.C. Cir. 1969); *United States v. Price*, 577 F.2d 1356 (9th Cir. 1978); *United States v. Friedman*, 593 F.2d 109 (9th Cir. 1979); *United States v. Kizer*, 569 F.2d 504 (9th Cir. 1979); *United States v. Duhon*, 565 F.2d 345 (5th Cir. 1978). Indeed, this Court has itself applied the doctrine to the confrontation clause. *Schneble v. Florida*, 405 U.S. 427 (1972).

The Ninth Circuit has applied the general rule in *Price*, *Friedman*, and *Kizer*. But for some reason it appeared to digress from the rule in *Chipman v. Mercer*, 628 F.2d 528, 533 (9th Cir. 1980). This, at most, establishes only an *intra*-circuit conflict.

But upon review of these Ninth Circuit cases, the Seventh Circuit did not see even an intra-circuit conflict. In its opinion below, it noted that since *Chipman*

relied on the above-cited Ninth Circuit cases and did not overrule them, it actually applied a harmless error standard.

Accordingly, the Seventh Circuit is in accord with the decisions of the Ninth Circuit and of the other Circuit Courts of Appeals as well. Therefore, the petition should be denied.

B. THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT AND THIS COURT.

The petitioner argues that the Seventh Circuit misconstrued this Court's ruling in *Sumner v. Mata*, 449 U.S. 539 (1981), when it determined that the question of whether the petitioner's sixth amendment right was violated was a mixed question of law and fact that could be decided *de novo*.

However, in its second *Sumner* opinion, this Court acknowledged that the ultimate question of constitutionality is a mixed question of law and fact that is not governed by § 2254 and that the only facts that underlie this determination are entitled to deference. *Sumner v. Mata*, ... U.S. ....., 102 S.Ct. 1303, 1306 (1982). This is exactly the rule followed by the Seventh Circuit. It looked at the underlying facts and made a determination as to whether the constitution was violated. And on the basis of those facts, it agreed with the state court *in toto*. Like the state court, it disagreed with most of petitioner's claims of error. And like the state court, it determined that the only error came when the trial court restricted cross-examination regarding the height of the petitioner, and that this error was harmless.

Since the Seventh Circuit was in complete agreement with the state court, the petitioner can certainly not show prejudice by claiming that the federal habeas court did

not properly defer to the findings of the state court. Therefore, the petition should be denied.

C. THIS COURT HAS ALREADY REJECTED THE CLAIM AS NOT WORTHY OF REVIEW.

The petitioner claims that this issue is of significance and importance. However, this Court has already rejected this claim. When the petitioner sought review after direct appeal, this Court denied it on February 23, 1981. *Scarpelli v. People of the State of Illinois*, 450 U.S. 915 (1981).

Now the petitioner seeks review of the same claim after an unsuccessful venture in federal habeas corpus relief. His claim is still not worthy of review by this Court and the petition should be denied.

CONCLUSION

For the foregoing reasons, the respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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